

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KENNETH LEE CRONK,

Plaintiff,

v.

CITY OF WEST RICHLAND, a municipal corporation; MAYOR DONNA NOSKI, in her official and personal capacity, CITY ATTORNEY BRONSON BROWN, in his official and personal capacity, POLICE CHIEF BRIAN MCELROY, in his official and personal capacity, TONY BENEGAS, in his official and personal capacity, RICHARD BLOOM, in his official and personal capacity, GAIL BROWN, in her official and personal capacity, BRENT GERRY, in his official and personal capacity, RON HAYDEN, in his official and personal capacity, ROBERT PERKES, in his official and personal capacity, RICH BUEL, in his official and personal capacity and DOES 1-25,

Defendants.

No. 4:14-CV-5041-EFS

**ORDER DENYING PLAINTIFF'S MOTION
FOR NEW TRIAL**

Before the Court, without oral argument, is the Plaintiff's Motion for New Trial, ECF No. 185, asking the Court to set aside the jury verdict and order a new trial on the grounds that (1) the testimony of two witnesses was perjured; (2) the Court erred by granting judgment as

1 a matter of law as to Plaintiff's claims under § 1985; (3) the notices
2 of trespass in the case are facially invalid under the First and
3 Fourteenth Amendments; (4) the notices are invalid under state and local
4 law; (5) the jury instructions were flawed; and (6) the Verdict, ECF
5 No. 179, is contrary to the weight of the evidence. Defendants oppose
6 the Motion. ECF No. 187. After reviewing the submitted materials and
7 relevant authority, the Court is fully informed. As is explained below,
8 the Court **denies** Plaintiff's motion.

9 **I. Background and Procedural History**

10 Mr. Cronk has been a citizen of West Richland for over 30 years
11 and was a regular attendee of the West Richland City Council meetings.
12 ECF No. 166, at 3. He has over 25 years of law enforcement experience
13 – including military service with the Army Military Police and time on
14 the Hanford Patrol – and is familiar with firearms. ECF No. 166, at 3,
15 8. Mr. Cronk attended 11 city council meetings between April 2008 and
16 November 2013. ECF No. 166, at 3. During the public comment period of
17 these meetings, Mr. Cronk spoke regarding incidents with the police that
18 had occurred at his home. See ECF No. 166, at 3.

19 According to Mr. Cronk, in 2006 and 2007 encounters with the police
20 occurred at his home that involved his son, a "mentally disabled third
21 party," and Mr. Cronk's wife, and the encounters resulted in the
22 hospitalization of Ms. Cronk and criminal citations being issued to Mr.
23 Cronk's wife and son. See ECF Nos. 56 & 73. Mr. Cronk believes that the
24 police investigation related to those encounters was improper and
25 insufficient. ECF Nos. 56 & 73. City officials, including Defendant
26

1 Mayor Noski, have looked into the matter and determined that there was
2 nothing the City could do. See ECF No. 166, at 4.

3 On June 8, 2012, another incident occurred involving police at Mr.
4 Cronk's home. ECF No. 166, at 6-7. Mr. Cronk had called the Washington
5 Department of Social and Health Services and allegedly threatened
6 employees there and other government officials. ECF No. 166, at 6-7. As
7 a result, the police were dispatched to Mr. Cronk's home. ECF No. 166,
8 at 6-7. Police arrived and transported Mr. Cronk to the hospital for a
9 mental health evaluation. ECF No. 166, at 7.

10 As a result of that incident and Mr. Cronk's alleged threats,
11 Defendants Police Chief McElroy and Mayor Noski believed that Mr. Cronk
12 was a public safety concern. ECF No. 56, at 10-12. After consulting with
13 the city attorney, they decided to "trespass" Mr. Cronk from city
14 property. ECF No. 166, at 7-8. The City claims that trespassing Mr.
15 Cronk was preferred over a criminal citation or a restraining order
16 because it was less intrusive. ECF No. 166, at 8; ECF No. 182, at 37.
17 A notice of trespass was delivered to Mr. Cronk on June 19, 2012. ECF
18 No. 166, at 2, 7. This notice was a complete bar to entry onto city
19 property at 3801 W. Van Giesen Street (City Hall and Public Works). ECF
20 No. 166, at 3, 7.

21 In July 2012, Mr. Cronk filed a lawsuit against the City. ECF No.
22 166, at 7; see also Complaint, *Cronk v. City of West Richland*, No. 12-
23 CV-5094-TOR (E.D. Wash. July 18, 2012) ECF No. 1. Mr. Cronk claims that
24 at some point during the pendency of that lawsuit the U.S. Marshals
25 Service instituted a policy requiring Mr. Cronk to advise security in
26 advance of his presence in the federal courthouse. ECF No. 1, at 16.

1 When present, Mr. Cronk claims that he was required to be accompanied
2 by a deputy U.S. Marshal or other security personnel. ECF No. 1, at 16.

3 In prosecuting that federal case, Mr. Cronk would routinely deliver
4 documents to West Richland City Hall. ECF No. 166, at 6. In July 2012,
5 Mr. Cronk delivered a set of documents to Ms. Richardson, a clerk at
6 West Richland City Hall. ECF No. 56, at 8. Ms. Richardson alleges that
7 during their conversation, Mr. Cronk said something to the effect that
8 he "had to take medications so that he doesn't think about shooting
9 people." ECF No. 56, at 8. Ms. Richardson reported this statement to
10 her superiors. ECF No. 56, at 8. Mr. Cronk adamantly denies the
11 allegation. ECF No. 78-1 ¶¶ 37-38. He claims that he has never
12 threatened any governmental employee. ECF No. 78-1 ¶¶ 37-38. He agrees
13 that he stated his displeasure and that he "had the right to 'sue' each
14 of the departments or agencies." ECF No. 78-1 ¶¶ 37-38.

15 As a result of Mr. Cronk's encounter with Ms. Richardson, a second
16 notice of trespass was issued on August 29, 2012, which covered 3803
17 (Police Station) and 3805 (Public Library) W. Van Giesen Street. ECF
18 No. 166, at 2-3, 7. City Council meetings were held at the public
19 library. ECF No. 166, at 7. Police Chief McElroy served the second
20 notice on Mr. Cronk on August 30, 2012. ECF No. 166, at 2. This notice
21 also included a provision allowing Mr. Cronk to access city services
22 and facilities by contacting Chief McElroy.

23 On November 5, 2013, after the second notice of trespass was
24 issued, Mr. Cronk attended a City Council meeting at the library to
25 inquire as to why he was trespassed. ECF No. 166, at 4. The City Council
26 informed him that they would look into it and have an answer at their

1 next meeting. ECF No. 166, at 4. At the next meeting on November 19,
2 2013, Mr. Cronk again asked why he was trespassed. ECF No. 166, at 4.
3 The Council referred him to Chief McElroy. ECF No. 166, at 4. Mr. Cronk
4 was not asked to leave either of these Council meetings. ECF No. 166,
5 at 8. After the second meeting, however, Chief McElroy wrote to Mr.
6 Cronk and reiterated that Mr. Cronk was allowed to go to the meetings
7 but needed to contact the Chief before he did so. ECF 56, at 21.

8 On March 27, 2014, Mr. Cronk brought this lawsuit, claiming that
9 under 42 U.S.C. § 1983 the notices of trespass were a violation of his
10 First and Fourteenth Amendment rights. ECF No. 1. He further claimed a
11 conspiracy by government officials to deprive him of said rights under
12 42 U.S.C. § 1985, but that claim was dismissed by judgment as a matter
13 of law. ECF No. 163. Additional claims against the city council members
14 were dismissed by summary judgment. ECF No. 95. The original complaint
15 included a number of state law claims but those were also dismissed via
16 summary judgment. ECF No. 35.

17 Following mediation and settlement attempts, ECF Nos. 97 & 111, a
18 jury trial was held from July 18, 2016, to July 21, 2016. On July 21,
19 2016, the jury returned a verdict in favor of Defendants on all remaining
20 claims. ECF No. 179. Plaintiff filed a timely motion for new trial on
21 August 18, 2016, based on claims that (1) two defendants testified
22 falsely; (2) the Court had erroneously granted Defendants' Motion for
23 Judgment as a Matter of Law as to the § 1985 claims; (3) the Court did
24 not adjudicate the facial validity of the notices of trespass under the
25 First and Fourteenth Amendments; (4) the Court did not determine that
26 the notices of trespass were issued in violation of state law; (5) the

1 Court's jury instructions were an incorrect expression of the law; and
2 (5) the verdict was inconsistent with the law. ECF No. 185. Defendants
3 filed a memorandum in opposition to Plaintiff's motion on August 24,
4 2016. ECF No. 187.

5 **II. Discussion**

6 Under Federal Rule of Civil Procedure 59, a district court may
7 grant a new trial "after a jury trial, for any reason for which a new
8 trial has heretofore been granted in an action at law in federal court."
9 Fed. R. Civ. P. 59(a)(1)(A). Such reasons include claims "that the
10 verdict is against the weight of the evidence, that the damages are
11 excessive, or that, for other reasons, the trial was not fair to the
12 party moving." *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).
13 The Ninth Circuit has further clarified the appropriate grounds for
14 granting a new trial, holding: "The trial court may grant a new trial
15 only if the verdict is contrary to the clear weight of the evidence, is
16 based upon false or perjurious evidence, or to prevent a miscarriage of
17 justice." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007)
18 (quoting *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493,
19 510 n.15 (9th Cir. 2000)); accord *Tortu v. Las Vegas Metro. Police*
20 *Dep't*, 556 F.3d 1075, 1087 (9th Cir. 2009). The district court is in
21 the best position to determine whether a new trial is appropriate
22 because "the district court can weigh the evidence and assess the
23 credibility of the witnesses." *Experience Hendrix L.L.C. v.*
24 *Hendrixlicensing.com Ltd*, 762 F.3d 829, 842 (9th Cir. 2014). In this
25 case, the Court finds that none of Plaintiff's claims justify granting
26 a new trial.

1 **A. Whether Witnesses Testified Falsely**

2 Plaintiff argues that Defendants Mayor Noski and Chief McElroy
3 committed perjury at trial and seems to suggest that such testimony
4 deprived him of a fair trial. ECF No. 185, at 2-9.

5 Plaintiff first argues that Mayor Noski's testimony at trial was
6 contradictory to her deposition testimony. ECF No. 185, at 2-4.
7 Specifically, Plaintiff notes that Mayor Noski testified during her
8 deposition that the notice of trespass was related only to Mr. Cronk's
9 threats communicated to Ms. Richardson, and subsequently testified at
10 trial that the first notice of trespass was based on Mr. Cronk's June
11 2012 encounter with the police at his house.

12 The Court finds no material discrepancy between Mayor Noski's
13 deposition and trial testimony, much less evidence of perjury. A witness
14 commits perjury when the witness "gives false testimony concerning a
15 material matter with the willful intent to provide false testimony,
16 rather than as a result of confusion, mistake, or faulty memory." *United*
17 *States v. Dunnigan*, 507 U.S. 87, 94 (1993). At most, it seems that Mayor
18 Noski may have confused the justifications for the two notices of
19 trespass. Mayor Noski's deposition testimony that the notice of trespass
20 was based on Mr. Cronk's interaction with Ms. Richardson is consistent
21 with her trial testimony regarding the second notice of trespass.
22 Regardless, Mr. Cronk was free to introduce the testimony that he
23 perceived to be contradictory, and Mr. Cronk did, in fact, question
24 Mayor Noski as to the content of her deposition testimony. ECF 182, at
25 26-28. Accordingly, the Court finds that any discrepancy between Mayor
26

1 Noski's deposition testimony and trial testimony was minor and
2 unintentional, and therefore insufficient to constitute perjury.

3 Plaintiff next argues that Chief McElroy also committed perjury
4 based on discrepancies between his deposition testimony and trial
5 testimony. ECF No. 185, at 4-9. The alleged discrepancy is similar to
6 the alleged discrepancy in Mayor Noski's testimony. Plaintiff notes that
7 Chief McElroy testified during his deposition that the notice of
8 trespass prohibiting Mr. Cronk from entering City Hall – the first
9 notice – was issued based on Mr. Cronk's interaction with Ms.
10 Richardson, but at trial Chief McElroy testified that the first notice
11 was based on an incident at Mr. Cronk's house. ECF No 185, at 4-7. As
12 above, the Court finds that this discrepancy is minor and, if anything,
13 demonstrates only that Chief McElroy had confused the two notices during
14 his deposition testimony. It is undisputed that the first notice of
15 trespass was issued before Mr. Cronk's interaction with Ms. Richardson
16 regarding his lawsuit filed in July 2012. Complaint, *Cronk*, No. 12-CV-
17 5094, ECF No. 1. In addition, Plaintiff had the opportunity to introduce
18 Chief McElroy's deposition testimony during his examination of Chief
19 McElroy and did so in relation to other perceived discrepancies. ECF
20 No. 183, at 25-27. Accordingly, the Court finds that any variations in
21 Chief McElroy's testimony were immaterial, unintentional, and did not
22 constitute perjury so as to effect a miscarriage of justice.

23 **B. Whether the Court Erred by Granting the Defendant's Motion**
24 **for Judgment as a Matter of Law on Plaintiff's § 1985 claims**

25 Plaintiff also seems to claim that the Court erred by granting
26 Defendant's Motion for Judgment as a Matter of Law as to Plaintiff's

1 claims under § 1985. ECF No. 185, at 7-9. Plaintiff argues that the
2 Court relied on "pure supposition" and a typographical error to conclude
3 that Defendants had not engaged in a conspiracy to prevent Plaintiff
4 from attending district court hearings in his 2012 lawsuit. ECF No. 185,
5 at 7-9.

6 In its Order granting in part Defendant's Motion for Judgment as
7 a Matter of Law, the Court explained that Plaintiff had not called any
8 witness from the U.S. Marshals Service and that evidence in the record
9 of Mr. Cronk's 2012 case provided a reasonable basis, other than a
10 conspiracy, for the action taken by the Marshals. ECF No. 163, at 2-3.
11 For that reason, Plaintiff did not satisfy his burden of proof as to
12 the § 1985 claims, and the Court's decision to grant Defendant's motion
13 was appropriate. *Ward v. E.E.O.C.*, 719 F.2d 311, 314 (9th Cir. 1983) ("To
14 prove a conspiracy [under § 1985], [Plaintiff] had to show an agreement
15 or 'meeting of the minds' to violate his constitutional rights.").

16 **C. Whether the Court Erred by Failing to Determine the Facial**
17 **Validity of the No Trespass Notices Under the First and**
18 **Fourteenth Amendments**

19 Plaintiff's generalized arguments regarding facial challenges
20 under the First and Fourteenth Amendments carry little weight. The issue
21 of facial challenge versus as-applied challenge is not clearly
22 applicable in this case. Because the notices of trespass apply only to
23 Mr. Cronk, it is not clear how the two approaches would vary. *Hoye v.*
24 *City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011) ("Because the
25 difference between an as-applied and a facial challenge lies only in
26 whether all or only some of the statute's subrules (or *fact-specific*

1 applications) are being challenged, the substantive legal tests used in
2 the two challenges are 'invariant.'" (emphasis added)). Regardless, the
3 Ninth Circuit has held that "a facial challenge must fail unless, at a
4 minimum, the challenged ordinance is directed narrowly and specifically
5 at expression or conduct commonly associated with expression." *Nunez by*
6 *Nunez v. City of San Diego*, 114 F.3d 935, 950 (9th Cir. 1997)(internal
7 quotation marks omitted). As reflected in the verdict, the jury
8 determined that the notices in this case were reasonable and not
9 motivated by a desire to limit Mr. Cronk's First Amendment rights.
10 Accordingly, any facial challenge to the notices would have failed.

11 **D. Whether the Court Erred by Failing to Determine the Validity**
12 **of the No Trespass Notices Under State and Local Law.**

13 In his Motion for New Trial, Plaintiff also argues that the Court
14 erred by failing to determine that the notices of trespass were invalid
15 under state and local law. ECF No. 185, at 14-16. In his Motion, however,
16 Plaintiff cites to no statutory provisions that the notices violated.
17 ECF No. 185. More importantly, Plaintiff did not raise this claim in
18 his complaint. See ECF No. 1. In his motion for new trial, Plaintiff
19 claims to have briefed the issue of the validity of the notices under
20 state law and cites to ECF Nos. 137 and 72. ECF No. 185, at 15. Nowhere
21 in these filings does Plaintiff argue specific state laws or local
22 ordinances that Defendants violated by issuing the notices of trespass.

23 Plaintiff contends that "at trial it was settled that, neither of
24 the Notices satisfied the State statutory requirements for a [sic]
25 enforceable ordinance or resolution." ECF No. 185, at 14-16. The
26 question of the validity of the notices, however, was not settled at

1 trial, as multiple Defendants testified that such a notice of trespass
2 was a standard practice and that the notices in this case complied with
3 the law. See, e.g., ECF No. 182, at 47-48. Accordingly, Plaintiff failed
4 to appropriately plead a claim that the notices were invalid under state
5 law and, regardless of his insufficient pleading, Plaintiff has never
6 provided evidence to support such a claim.

7 **E. Whether the Jury Instructions Were an Incorrect Expression**
8 **of the Law that Resulted in a Verdict Inconsistent with the**
9 **Law**

10 Plaintiff filed notice with the Court prior to trial that he had
11 no objection or suggested modifications to the Court's preliminary jury
12 instructions. ECF No. 150. Now, in his claim that the Court's jury
13 instructions were erroneous, Plaintiff argues that the Court should have
14 instructed the jury as to the law for determining the type of forum at
15 issue and given the jury guidance as to the definition of
16 reasonableness. ECF No. 185, at 16-17. Plaintiff did not propose an
17 instruction defining reasonableness or instructing the jury as to the
18 law regarding the type of forum at issue. Instead, Plaintiff's proposed
19 jury instructions included the "undisputed fact" that the city council
20 forum at issue was a limited public forum. ECF No. 150, at 9. In
21 addition, Plaintiff's proposed jury instructions 13 through 24 and 26
22 used the term "reasonable" or "reasonableness" without defining it.
23 Accordingly, Plaintiff has waived the argument that the instructions
24 should have defined reasonableness or allowed the jury to determine the
25 type of forum at issue. See Fed. R. Civ. P. 51; *Fireman's Fund Ins. Co.*
26 *v. Alaskan Pride P'ship*, 106 F.3d 1465 (9th Cir. 1997). Nevertheless,

1 the Court correctly stated that the government buildings at issue
2 included limited public forums and non-public forums. *Reza v. Pearce*,
3 806 F.3d 497 (9th Cir. 2015) ("[C]ity council meetings, where the public
4 has the opportunity to address officers of a local government or local
5 governmental agency, are limited public fora." (citing *White v. City of*
6 *Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990)); *Greer v. Spock*, 424 U.S.
7 828, 836 (1976) (explaining that unless opened to public speech,
8 government property remains a nonpublic forum because the government
9 "has power to preserve the property under its control for the use to
10 which it is lawfully dedicated").

11 **F. Whether the Verdict is Contrary to the Law Due to Want of**
12 **Evidence**

13 Finally, Plaintiff claims that "no direct evidence was presented
14 concerning any threats to any individual at any time by Plaintiff" and
15 that "each of the defendants testified that at no time did the Plaintiff
16 threaten them or anyone at city council meetings or at anytime." ECF
17 No. 185, at 16. Based on this claim, Plaintiff argues that the jury's
18 verdict was not supported by the evidence. Contrary to Plaintiff's
19 claim, however, multiple witnesses testified as to the threats made by
20 Mr. Cronk, including Defendants Mayor Noski and Chief McElroy. The Court
21 finds that the jury appropriately credited this testimony.

22 Chief McElroy testified that the incident that prompted the first
23 notice of trespass involved threats to staff at the Department of Social
24 and Health Services. ECF No. 182, at 37-38; ECF No. 183, at 69. Mayor
25 Noski testified that she learned of Mr. Cronk making threats to clerk
26 Ms. Richardson on July 18, 2012, and that the second notice of trespass

1 was issued as a result. ECF No. 182, at 29-31. Chief McElroy also
2 testified that the second notice of trespass was prompted by a statement
3 Mr. Cronk made to Ms. Richardson about shooting up the office. ECF No.
4 182, at 43; ECF No. 183, at 71, 75. In fact, Plaintiff introduced an
5 email by Chief McElroy in which Chief McElroy wrote that the first
6 trespass notice was "based solely on safety concerns raised during the
7 past couple of weeks." ECF No. 182, at 45-46. Chief McElroy further
8 explained that the notices were issued based on "concerns for staff
9 safety" in order to give the police the "ability to take enforcement
10 action" and the "ability to control . . . the situation" and to avoid
11 "a situation where we have staff members that feel threatened and cannot
12 conduct business." ECF No. 182, at 47-48. Chief McElroy also indicated
13 that he considered Mr. Cronk to be an "imminent risk" based on an
14 analysis by mental health professionals. ECF No. 182, at 50.

15 Plaintiff also claims that "at trial defendants failed to introduce
16 any direct or circumstantial evidence of city council meeting
17 disruptions or alike caused by the Plaintiff." ECF No. 185, at 18. This
18 is immaterial, as the Defendants did not argue that Mr. Cronk was
19 disruptive at such meetings or that disruptive behavior supported the
20 notices of trespass. Regardless, Chief McElroy did testify that Mr.
21 Cronk "would become agitated and frustrated" at city council meeting.
22 ECF No. 183, at 68.

23 Based on the above statements and the testimony of other witnesses,
24 it is clear that there was substantial evidence to support a finding
25 that Mr. Cronk was reasonably trespassed based on threats he had made
26 and the perception that Mr. Cronk presented a legitimate and imminent

1 threat to city staff. The jury's verdict is supported by the weight of
2 the evidence presented at trial.

3 **III. Conclusion**

4 For the above reasons, the Court concludes that Mr. Cronk is not
5 entitled to a new trial because the verdict is not against the weight
6 of the evidence and the trial was fair. Mr. Cronk was not prejudiced by
7 any variation in Mayor Noski and Chief McElroy's deposition and trial
8 testimony, and there is no evidence that Mayor Noski and Chief McElroy
9 committed perjury. In addition, the Court did not err by failing to
10 perform a facial challenge to the notices of trespass under the First
11 and Fourteenth Amendments or by failing to assess the validity of the
12 notices under local or state law. The Court also finds that the jury
13 instructions were not erroneous and that Plaintiff has waived any
14 argument to the contrary. The verdict in this case is based upon
15 substantial evidence presented at trial and, therefore, allowing the
16 verdict to stand will not result in a miscarriage of justice.

17 Accordingly, **IT IS HEREBY ORDERED:** Plaintiff Cronk's Motion for
18 New Trial, **ECF No. 185**, is **DENIED**.

19 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
20 Order and provide copies to all counsel.

21 **DATED** this 28th day of September 2016.

22 _____s/Edward F. Shea
23 EDWARD F. SHEA
24 Senior United States District Judge
25
26